No. 15,106

United States Court of Appeals

For the Ninth Circuit

RICAREDO BERNABE DELA CENA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

Cases

Statutes

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BRIEF FOR APPELLEE.

The Appellee agrees with Appellant's Statement of Jurisdiction and Statement of the Case, except that the Appellee has considered all possible statutes under which Appellant might be eligible and therefore has considered in addition to those urged by the Appellant:

Sec. 328, Immigration and Nationality Act, 8 USC 1439.

Sec. 324(a), Nationality Act of 1940, 54 Stat. 1149.

STATUTES INVOLVED.

Sec. 324, *Nationality Act of 1940,* 54 Stat. 1149

"Sec. 324. (a) A person who has served honorably at any time in the United States Army,

Navy, Marine Corps, or Coast Guard for a period or periods aggregating three years and who, if separated from such service, was separated under honorable conditions, may be naturalized without having resided, continuously immediately preceding the date of filing such person's petition, in the United States for at least five years and in the State in which the petition for naturalization is filed for at least six months, if such petition is filed while the petitioner is still in the service or within six months after the termination of such service. (54 Stat. 1149; 8 U.S.C. 724.)

IF PETITION FILED WHILE IN SERVICE OR WITHIN SIX MONTHS OF ITS TERMINATON; REQUIREMENTS AND EXEMPTIONS

(b) A person filing a petition under subsection (a) of this section shall comply in all respects with the requirements of this chapter except that—

(1) No declaration of intention shall be required;

(2) No certificate of arrival shall be required;

(3) No residence within the jurisdiction of the court shall be required;

(4) Such petitioner may be naturalized immediately if the petitioner be then actually in any of the services prescribed in subsection (a) of this section, and if, before filing the petition for naturalization, such petitioner and at least two verifying witnesses to the petition, who shall be citizens of the United States and who shall identify petitioner as the person who rendered the service upon which the petition is based, have

appeared before and been examined by a representative of the Service. (54 Stat. 1149; 8 U.S.C. 724.)

WHERE SERVICE NOT CONTINUOUS; PROOF OF RESIDENCE GOOD MORAL CHARACTER, AND ATTACHMENT TO THE PRINCIPLES OF THE CONSTITUTION

(c) In case such petitioner's service was not continuous, petitioner's residence in the United States and State, good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during any period within five years immediately preceding the date of filing said petition between the periods of petitioner's service in the United States Army, Navy, Marine Corps, or Coast Guard, shall be verified in the petition filed under the provisions of subsection (a) of this section, and proved at the final hearing thereon by witnesses, citizens of the United States, in the same manner as required by section 309. Such verification and proof shall also be made as to any period between the termination of petitioner's service and the filing of the petition for naturalization. (54 Stat. 1149; 8 U.S.C. 724.)" . . .

Sec. 324A, *Nationality Act of 1940,* 62 Stat. 281.

"Sec. 324A. (a) Any person not a citizen who has served honorably in an active-duty status in the military or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, or who, if separated from such service, was separated under honorable conditions,

may be naturalized as provided in this section if (1) at the time of enlistment or induction such person shall have been in the United States or an outlying possession (including the Panama Canal Zone, but excluding the Philippine Islands), or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence. The executive department under which such person served shall determine whether persons have served honorably in an active-duty status, and whether separation from such service was under honorable conditions: *Provided, however,* That no person who is or has been separated from such service on account of alienage, or who was a conscientious objector who performed no military or naval duty whatever or refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purposes of this section." . . .

Sec. 328, *Immigration and Nationality Act,* 8 USC 1439.

"(a) A person who has served honorably at any time in the armed forces of the United States for a period or periods aggregating three years, and, who, if separated from such service, was never separated except under honorable conditions, may be naturalized without having resided continuously immediately preceding the date of filing such person's petition, in the United States for at least five years, and in the State in which the petition for naturalization is filed for at least six months, and without having been physically present in the United States for any specified

period, if such petition is filed while the petitioner is still in the service or within six months after the termination of such service.

EXCEPTIONS

(b) A person filing a petition under subsection (a) of this section shall comply in all other respects with the requirements of this subchapter, except that—

(1) no residence within the jurisdiction of the court shall be required;

(2) notwithstanding section 1447(c) of this title, such petitioner may be naturalized immediately if the petitioner be then actually in the Armed Forces of the United States, and if prior to the filing of the petition, the petitioner and the witnesses shall have appeared before and been examined by a representative of the Service;

(3) the petitioner shall furnish to the Attorney General, prior to the final hearing upon his petition, a certified statement from the proper executive department for each period of his service upon which he relies for the benefits of this section, clearly showing that such service was honorable and that no discharges from service, including periods of service not relied upon by him for the benefits of this section, were other than honorable. The certificate or certificates herein provided for shall be conclusive evidence of such service and discharge.

WHEN SERVICE NOT CONTINUOUS

(c) In the case such petitioner's service was not continuous, the petitioner's residence in the United States and State, good moral character,

attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during any period within five years immediately preceding the date of filing such petition between the periods of petitioner's service in the Armed Forces, shall be alleged in the petition filed under the provisions of subsection (a) of this section, and proved at the final hearing thereon. Such allegation and proof shall also be made as to any period between the termination of petitioner's service and the filing of the petition for naturalization." . . .

Sec. 329, *Immigration and Nationality Act,* 8 USC 1440.

"(a) Any person who, while an alien or a noncitizen national of the United States, has served honorably in an active-duty status in the military, air, or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, and who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment or induction such person shall have been in the United States, the Canal Zone, American Samoa, or Swains Island, whether or not he has been lawfully admitted to the United States for permanent residence, or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence. The executive department under which such person served shall determine whether persons have served honorably in an active-duty

status, and whether separation from such service was under honorable conditions: *Provided, however,* That no person who is or has been separated from such service on account of alienage, or who was a conscientious objector who performed no military, air, or naval duty whatever or refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purposes of this section. No period of service in the Armed Forces shall be made the basis of a petition for naturalization under this section if the applicant has previously been naturalized on the basis of the same period of service.

EXCEPTIONS

(b) A person filing a petition under subsection (a) of this section shall comply in all other respects with the requirements of this subchapter, except that—

(1) he may be naturalized regardless of age, and notwithstanding the provisions of section 1442 of this title;

(2) no period of residence or specified period of physical presence within the United States or any State shall be required;

(3) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner;

(4) service in the military, air, or naval forces of the United States shall be proved by a duly authenticated certification from the executive department under which the petitioner served or is serving, which shall state whether the petitioner served honorably in an active-duty status

during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, and was separated from such service under honorable conditions; and

(5) notwithstanding section 1447(c) of this title, the petitioner may be naturalized immediately if prior to the filing of the petition the petitioner and the witnesses shall have appeared before and been examined by a representative of the Service." . . .

Sec. 284, *Immigration and Nationality Act,* 8 USC 1354.

"Nothing contained in this subchapter shall be construed so as to limit, restrict, deny, or affect the coming into or departure from the United States of an alien member of the Armed Forces of the United States who is in the uniform of, or who bears documents identifying him as a member of, such Armed Forces, and who is coming to or departing from the United States under official orders or permit of such Armed Forces: *Provided,* That nothing contained in this section shall be construed to give to or confer upon any such alien any other privileges, rights, benefits, exemptions, or immunities under this chapter, which are not otherwise specifically granted by this chapter. June 27, 1952, c. 477, Title II, ch. 9, §284, 66 Stat. 232."

Act of June 30, 1953, 67 Stat. 108, 8 USC 1440(a).

"Notwithstanding the provisions of sections 1421 (d) and 1429 of this title, any person, not a citizen, who, after June 24, 1950, and not later than July 1, 1955, has actively served or actively

serves, honorably, in the Armed Forces of the United States for a period or periods totaling not less than ninety days and who (1) having been lawfully admitted to the United States for permanent residence, or (2) having been lawfully admitted to the United States, and having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces, may be naturalized on petition filed not later than December 31, 1955, upon compliance with all the requirements of this chapter, except that—'' . . .

Sec. 101(a)(20), *Immigration and Nationality Act,* 8 USC 1101(a)(20).

''(20) The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.''

Sec. 101(a)(15), *Immigration and Nationality Act,* 8 USC 1101(a)(15).

''(15) The term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens—'' . . .

Sec. 101(a)(16), *Immigration and Nationality Act,* 8 USC 1101(a)(16).

''(16) The term 'immigrant visa' means an immigrant visa required by this chapter and properly issued by a consular officer at his office outside of the United States to an eligible immigrant under the provisions of this chapter.''

Sec. 101(a)(26), *Immigration and Nationality Act*, 8 USC 1101(a)(26).

"(26) The term 'nonimmigrant visa' means a visa properly issued to an alien as an eligible nonimmigrant by a competent officer as provided in this chapter."

THE QUESTIONS PRESENTED.

1. Was the Appellant lawfully admitted for permanent residence?

2. If Appellant was not lawfully admitted for permanent residence, is he eligible under any statute not requiring lawful admission for permanent residence, namely, Sec. 324(a), Nationality Act of 1940; Sec. 329, Immigration and Nationality Act of 1952; 8 USC 1440(a)?

SUMMARY OF ARGUMENT.

Appellant was not "lawfully admitted for permanent residence" in that he was not "lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the *immigration* laws. Secondly, he is not eligible under the provisions of any statutes which do not require lawful admission for permanent residence.

ARGUMENT.

Appellant's only coming to the United States occurred on April 1, 1954, at San Francisco, California as a seaman in the United States Navy, without im-

migration inspection. (R. 13, 31.) In connection with this coming to the United States, the Immigration and Nationality Act governs any rights which may have accrued therefrom. The following sections are pertinent: 8 USC 1354; 8 USC 1101(a)(20); 8 USC 1101(a)(15); 1101(a)(16); 1181(a).

Starting with Section 1354 of Title 8: this section allows for the "*coming into or departure* from the United States" of an alien member of the armed forces of the United States. Congress has carefully worded the section to avoid the use of the words of art "entry" or "lawful admission". Congress also saw fit to provide that this action would not be "construed to give or to confer upon any such alien any other privileges, rights, benefits, exemptions, or immunities under this Act which are not otherwise specifically granted by this Act". The Appellee therefore maintains that the Appellant gains nothing by his "coming into the United States" under military orders. Therefore, any rights he may have must be found within the Immigration and Nationality Act.

Section 1101(a)(20), Title 8, United States Code, defines "lawful admission for permanent residence". The Appellant cannot meet the conditions of that definition. First, he must be *admitted* to the United States. It is the contention of the Appellee that Appellant was not admitted to the United States as contemplated by existing law at the time of his "coming into" the United States. (8 USC 1225.)

Secondly, he must be *admitted as an immigrant.* He cannot be admitted to the United States as an

immigrant unless he has an immigrant visa. 8 USC 1181(a); 8 USC 1101(a)(16). There is absolutely nothing in the record indicating that Appellant had in his possession or was ever issued an immigrant visa. See *Zackarias v. McGrath,* DC DC 1952, 105 F.Supp. 421; *Zubrick v. Borg,* 47 F. (2d) 690; *DeVita v. Uhl,* 2 Cir. 1939, 99 F. (2d) 825. The District Court was quite correct in refusing to accept a stipulation that the Appellant's intention at the time of his coming to the United States was to remain permanently. This subjective intent had no bearing on his immigration status.

Appellant gained nothing by his coming to the United States as a member of the armed forces under military orders. Anything that he gained must be specifically granted by the Immigration and Nationality Act. The authorities cited by Appellant all refer to arrivals in the United States prior to the effective date of the Act. *In re Echiverri,* 131 F. Supp. 674 is a good example of where arrival in the United States under military orders took place prior to December 24, 1952 and was not governed by the limiting provisions of 8 USC 1354. Under prior law there was a logical basis for an "implied waiver of inspection"—see *In re Echiverri*—with the accrual of any benefits therefrom. But under the present Act there is an express waiver of inspection granted by statute with very definite limiting provisions which cut off the conferring of any benefits which may arise from the waiver of inspection. If, as contended, Appellant was *not* lawfully admitted for permanent resi-

dence, the following statutes do not apply to the Appellant:

Sec. 324A, Nationality Act of 1940 (as added 62 Stat. 281). Appellant enlisted in the Philippine Islands, which excludes him under provision (1), and he was not subsequently lawfully admitted to the United States for permanent residence, which excludes him under provision (2). Since Sec. 329, Immigration and Nationality Act, is in all material respects identical with 324A above, he is not eligible under that section either.

Appellant cannot qualify under provision (1) of 8 USC 1440(a), which requires lawful admission for permanent residence.

Lawful Admission.

Appellant contends he is lawfully admitted to the United States. Appellee contends that lawful admission contemplates immigration inspection or a legal waiver therefor.

When a person is inspected, certain benefits flow from that inspection, as well as obligations. Non-immigrants are lawfully admitted—the type of lawful admission that would confer benefits. See Sec. 1101(a)(15) for classifications of non-immigrants.

Appellant contends that his coming was as a non-immigrant and consequently he has a "lawful admission". This overlooks the importance of Sec. 1354, Title 8, which allows for his coming and going while under military orders, but does not grant any benefits. A study of Appellant's cases shows that the

facts there presented concern *entries* prior to December 24, 1952. Consequently, he was not eligible under provision (2) of 8 USC 1440(a).

A careful study of the two remaining sections, 328, Immigration and Nationality Act, and 324(a), Nationality Act of 1940, shows that they are practically identical. With one very significant difference, 328, Immigration and Nationality Act, requires a lawful admission for permanent residence, hence, Appellant does not qualify thereunder.

There remains only Sec. 324(a) of the Nationality Act of 1940. This section does *not* require either a lawful admission for permanent residence or a lawful admission.

Assuming for the purposes of this argument that Sec. 405(a), Immigration and Nationality Act (note to 8 USC 1101(a)) saves this section under the facts herein presented—the next question is whether the Appellant qualifies. Under the facts he has three years' service but not continuous. Sec. 324(c) requires residence in the United States "during any period within five years immediately preceding the date of filing said petition between the periods of petitioner's service". This the Appellant cannot do. He did not come to the United States until 1954 and did not file his petition until September 2, 1955.

He must therefore prove residence in the United States for five years preceding September 2, 1955. This he cannot do. Since he was resident in the Republic of the Philippines from September 1950 to April 1954, he cannot qualify under 324(a) of the Nationality Act of 1940.

There are also grave doubts that the savings clause applies to the facts of this case. A right in the process of acquisition should be accompanied by an affirmative act. *U. S. v. Menasche,* 348 U.S. 525; *Aure v. U. S.,* 225 F. (2d) 88 (9 Cir. 1955). Where there is a fully matured right, then no affirmative act is necessary. *Aure v. U. S., supra. In re Jocson,* 117 F. Supp. 528 (U.S. D.C. Hawaii, 1954). Here, if the Appellant had anything, he had a right in the process of acquisition and he had taken no affirmative action.

CONCLUSION.

Appellant was not lawfully admitted for permanent residence. He was not lawfully admitted in the sense that he gained immigration or naturalization benefits from his coming to the United States. Nor is he qualified under any statute which does not require lawful admission.

Dated, Honolulu, T. H.,
September 5, 1956.

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